

Falls Church, Virginia 22041

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Date: **NOV 23 1999**

In re: PAULINE DELPHINE NGO BAPACK

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Marsha K. Badanes, Accredited Representative
Immigration Assistance Center
8121 Georgia Avenue
Silver Spring, Maryland 20910

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] -
Convicted of aggravated felony

APPLICATION: Withholding of removal

The respondent has appealed the June 9, 1999, decision of an Immigration Judge which found her ineligible for withholding of removal because she had been convicted of a particularly serious crime. She also requests a remand. The appeal will be dismissed in part, and sustained in part. The record will be remanded so that the respondent can present her claim under Article 3 of the Convention Against Torture.

I. CASE HISTORY

The respondent is a native and citizen of Cameroon who entered the United States as a nonimmigrant visitor on or about August 1, 1984. In a Notice to Appear dated March 6, 1998, the respondent was charged as removable under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227 (a)(2)(A)(iii), as an alien convicted of an aggravated felony. It was alleged that on December 9, 1996, the respondent was convicted in the United States District Court for the District of Columbia for (1) conspiracy to defraud the government, (2) false claims and causing an act to be done, and (3) mail fraud and causing an act to be done.

In a decision dated May 22, 1998, an Immigration Judge found that the respondent was removable as charged, and that she did not establish eligibility for any form of relief. The Immigration Judge specifically found the respondent ineligible for withholding of removal because she had been convicted of a particularly serious crime. See section 241(b)(3)(B) of the Act, 8 U.S.C. § 1251(b)(3)(B). The respondent appealed this decision to the Board. On February 1, 1999, we found that the issue of whether the respondent had been convicted of a particularly serious crime should be reevaluated. The record was remanded for this purpose.

II. REMANDED PROCEEDINGS

A hearing was set for May 19, 1999, and the respondent's counsel was contacted by telephone. The proceedings were adjourned until June 9, 1999, so that the respondent could prepare her withholding claim.

On June 9, 1999, the respondent was present without counsel. She stated that counsel had told her that he was unable to appear because of an emergency. The Immigration Judge noted that counsel had not contacted the Immigration Court, and that attempts to contact him at his office were unsuccessful. The respondent indicated that she had prepared for the hearing and was ready to proceed. See Tr. at 14, 25. The issue being evaluated was whether the respondent's convictions were for a particularly serious crime which would bar her from withholding of removal.

The respondent's testimony revealed that she had been the co-owner of a business which would, pursuant to a doctor's order, arrange for nurses to visit the infirm at their homes. The company would then seek reimbursement from the government. Her convictions stemmed from false billing for services never rendered. The respondent denied that she intentionally committed any crimes, but she accepted criminal responsibility as the owner and manager of the business. She explained that she had been a naive entrepreneur, and erred in forwarding bills without checking whether actual home visits had been made. She explained that allegations against her business were initially made by a disgruntled ex-employee. The respondent emphasized that no patient was actually harmed by a missed visit. See Tr. at 34-35. However, she acknowledged that harm could have resulted to a patient. Id. The respondent was asked about the specific charges in the indictment which indicated that she had instructed nurses not to go on certain visits. She stated that she had never read the indictment in its entirety. The Service maintained that the respondent's crime was particularly serious. It chose to rely on the details of the crime as provided in the indictment, the Pre-Sentencing Report (PSI), and the other conviction records.

The respondent submitted numerous certificates indicating that she has successfully completed business related courses while in prison, and has been participating in religious and counseling courses by mail. She provided a supportive letter from other prisoners. The respondent also submitted her own statement which expressed remorse for her crime and emphasizes her achievements while incarcerated. She also explains that she has children in the United States, and that she wants to be reunited with them upon release. The respondent submitted a 1998 Amnesty International Report on conditions in Cameroon, and a copy of a Request for Asylum (Form I-589) which had been filed before the Service in 1992, and its supporting documents.

The conviction records show that on December 9, 1996, the respondent was convicted in the United States District Court for the District of Columbia for (1) conspiracy to defraud the government, (2) false claims and causing an act to be done, and (3) mail fraud and causing an act to be done, in violation of 18 U.S.C. §§ 286, 287, 1341, respectively, and 18 U.S.C. § 2. In a decision dated December 5, 1997, the respondent's appeal of her conviction was dismissed by the United States Court of Appeals for the District of Columbia Circuit.

The respondent's indictment and PSI explain that the respondent's business was billing Medicaid and Medicare for home health care services, including skilled nurse care visits, which had never been made. Former employees had testified that the respondent would ask them to create nursing records so that the patient's file would falsely reflect that visits had been made. Some of the alleged visits were made to the homes of patients who were hospitalized. Evidence introduced at the criminal trial revealed that upon review of approximately 120 patients, the respondent's business had submitted approximately 1470 claims for nursing visits for which there were no records, and payments had been made by Medicare and Medicaid from January to October 1995.

The sentencing document shows that the Court adopted the recommendations in the PSI for several sentence level increases because the respondent's crime involved between \$70,000 and \$120,000, more than minimal planning was involved, and because the defendant was an organizer, leader, manager, or supervisor of the criminal activity. The respondent was sentenced to concurrent 27-month terms of incarceration for the various counts, and to 3 years of supervised probation upon release from incarceration. The respondent, along with her co-defendant, was also ordered to pay \$72,294.50 in restitution to Medicare (35%) and Medicaid (65%).

III. THE DECISION OF THE IMMIGRATION JUDGE AND THE APPEAL

The Immigration Judge found that the respondent had committed a particularly serious crime, and was therefore barred from withholding of removal. He specifically considered that the crime involved a lengthy conspiracy to defraud the government, and that the respondent acknowledged that actual harm could have occurred by the lack of a home visit.

The respondent has challenged this finding on appeal. She argues that her crime should not be classified as particularly serious, and she emphasizes that neither violence nor narcotics were involved, and that no patient actually suffered harm as a result. She maintains that her criminal role was limited to false billing, and that she accepted responsibility for the crime as an owner of the business. She also explains that she had entered the business with a boyfriend after leaving an abusive marriage, and that she was lacking business experience. The respondent wants her positive record in prison to be considered.

Finally, the respondent argues that the Immigration Judge did not objectively evaluate her case because he was annoyed at her counsel's failure to appear, and that he should have advised her of potential eligibility under Article 3 of the Convention Against Torture. She requests a remand so that the merits of her withholding application can be considered, and so she can represent a claim under Article 3.

IV. WITHHOLDING OF REMOVAL - PARTICULARLY SERIOUS CRIME BAR

Section 241(b)(3)(B)(ii) of the Act states that an alien is ineligible for withholding if, "the alien, having been convicted of a particularly serious crime, is a danger to the community of the United States." The final paragraph of section 241(b)(3)(B) states that:

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least five years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of the sentence imposed, an alien has been convicted of a particularly serious crime. . . .

As explained in our previous decision, the respondent has been convicted of an aggravated felony. However, her criminal sentence does not exceed 5 years. We therefore look at the particulars of her crime in determining whether it is particularly serious. See Matter of S-S-, Interim Decision 3374 (BIA 1999) (holding that in making this discretionary determination, we will use the analysis set forth in Matter of Frentescu, 18 I&N Dec. 244 (BIA 1982), modified, Matter of C-, 20 I&N Dec. 529 (BIA 1992), Matter of Gonzalez, 19 I&N Dec. 682 (BIA 1988)). The relevant factors include the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the respondent is a danger to the community. Matter of Frentescu, *supra*, at 247. Crimes against persons are more likely to be categorized as particularly serious, but that there may be instances where crimes against property will be considered to be particularly serious. *Id.* Further, once an alien is found to have committed a particularly serious crime, there is no need for a separate determination to address whether the alien is a danger to the community. See Matter of O-T-M-T-, 21 I&N Dec. 639, 646-7 (BIA 1996).

V. EVALUATION OF THE RESPONDENT'S CRIME

We review the respondent's crimes. The respondent was convicted under 18 U.S.C.A. § 286, which is entitled "Conspiracy to defraud the Government with respect to claims." It states:

Whoever entered into any agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim, shall be fined under this title or imprisoned not more than ten years, or both.

The respondent also was convicted under 18 U.S.C.A. § 287, which is entitled "False, fictitious or fraudulent claims." It reads:

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious or fraudulent shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

The federal crime of "Frauds and swindles" is set out at 18 U.S.C.A. § 1327. It reads:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

Upon examination of the underlying facts and circumstances of the respondent's convictions, we find that her violation of each of these statutes amounts to the commission of a "particularly serious crime." The respondent's crime involved a protracted conspiracy to defraud Medicare and Medicaid. The amount of restitution shows that substantial sums were swindled from the government, as well as the finding that over 1400 home visits were not supported by adequate documentation. We find that these factors support a finding that the respondent's fraud was a particularly serious crime.

We also consider that the respondent's crime resulted in a number of infirm individuals being deprived of health care which had been ordered by a doctor. Regardless of whether any actual injury or death was documented, the potential for harm to large numbers of unwilling victims cannot be overlooked. Cf. Matter of L-S-, Interim Decision 3386 (BIA 1999) (conviction for bringing an illegal alien into the United States is not found to be a "particularly serious crime."). Therefore, the lack of any evidence of actual harm does not mitigate the severity of the crime in our analysis. We further consider that the respondent violated the trust placed in her by government and health care officials, and precluded other willing agencies from taking actual care of the infirm individuals.

The seriousness of the respondent's crimes is further revealed by the fact that her sentence level was increased due to her role as an organizer, and because more than minimal planning was involved. This belies the respondent's claim that her crime was only the result of carelessness and business naivete. We also find that the respondent's sentence of 27 months incarceration, followed by 3 years of probation, and substantial restitution, is significant enough to indicate that the crimes at issue rise to the level of particularly serious.

Finally, we point out that our focus is on the circumstances related to the crime for which the respondent was convicted, and not on any equities or other favorable discretionary factors.

See Matter of S-S-, supra, at 11. Therefore, the respondent's length of residency, family ties in the United States, achievements in prison, and related factors, are not determinative factors in this case.

In sum, we agree with the Immigration Judge that the respondent has been convicted of particularly serious crime within the meaning of section 241(b)(3)(B) of the Act. She is therefore barred from withholding of removal, and the underlying merits of that claim will not be addressed.

VI. REMAINING ISSUES

The respondent contends that the Immigration Judge did not objectively evaluate her claim because he was annoyed that her counsel failed to appear. The transcript shows that the respondent indicated that she wanted to proceed without counsel, and was given full opportunity to present her case. Furthermore, the respondent has not provided any specific examples of how this alleged prejudice led to the wrong decision in her case. Under these circumstances, we will not address her claim further.

Finally, we address the respondent's argument that she should have been advised about the possibility of applying for deferral of removal under the interim regulations which implement Article 3 of the Convention Against Torture. See 64 Fed. Reg. 8478-96 (Feb. 19, 1999) (to be codified at 8 C.F.R. pt. 3 et. seq., effective March 22, 1999). The record contains the respondent's Request for Asylum in the United States (Form I-589), and supporting documentation, which states that she fears harm or death from the government in Cameroon if she is returned to that country. See Exhibit B. We determine that a remand is appropriate so that the respondent can have the opportunity to submit an updated Form I-589 and present her claim under Article 3.

In sum, the respondent is removable as charged, and we agree with the Immigration Judge that she has committed a particularly serious crime which bars her from withholding of removal. The record will be remanded for the purpose of allowing the respondent to present her application for deferral of removal. Accordingly, the appeal will be dismissed in part, and sustained in part.

ORDER: The appeal is dismissed in part.

FURTHER ORDER: The appeal is sustained in part, and the record is remanded for further proceedings in accord with the foregoing decision.



FOR THE BOARD